U.S. Department of Labor

Office of Administrative Law Judges
603 Pilot House Drive, Suite 300
Newport News, Virginia 23606-1904

TEL (757) 873-3099
FAX (757) 873-3634

Date: December 28, 1999

Case Nos: **1999-LHC-0059**
1998-LHC-0825

OWCP Nos: **5-102625**
5-97181

In the Matter of:

GEORGE N. DOSS,
Claimant,

v.

NORFOLK & WESTERN RAILWAY COMPANY,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

DECISION AND ORDER GRANTING COMPENSATION BENEFITS AND AWARDING SECTION 8(f) RELIEF

This proceeding arises from a claim filed under the provision of the Longshore and Harbor Workers, Compensation Act, as amended, 33 U.S.C. 901 et seq.

A formal hearing was held in Newport News, Virginia, on September 28, 1998, at which time all parties were afforded full opportunity to present evidence and argument as provided in the act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of

the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS[1]

At the hearing, the Claimant and the Employer stipulated as follows:

1. On November 13, 1995, Doss was employed as a machinist by N&W; a significant part of his job was to repair and maintain ship loading equipment. On that date, Doss strained his right rib cage while engaged in this work. N&W has fully paid all compensation benefits owed to Doss for this injury.

2. On October 5, 1997, Doss continued to be employed as a machinist by N&W with the same job functions. On that date, Doss strained both sides of his chest while finishing the repairs to a retarder cylinder.

3. Doss filed a claim on December 31, 1997 for medical treatment by Dr. Morales in connection with his 1995 injury. This claim was assigned OWCP No. 5-097181. N&W controverted, on the basis that Dr. Morales was not authorized as Doss's treating doctor. This issue is the basis of 98-LHC-825.

4. Doss filed a claim on June 5, 1998 in connection with his 1997 injury. This claim was assigned OWCP No. 5-102625. N&W controverted this claim, on the basis that Doss had not suffered a compensable injury in 1997.

5. N&W agrees that Doss's October 5, 1997 injury was compensable under the LHWCA.

6. Doss's average weekly wage for the year before the 1997 injury was $947.97, which includes his regular earnings from his part-time job as a short-order cook. The agreed compensation rate for the 1997 injury is $631.98 per week.

7. Doss is entitled to temporary total disability benefits for the period October 6, 1997 through February 24, 1999.

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[1] The following abbreviations will be used as citations to the record:

TR - Transcript of hearing;
EX - Employer's Exhibits.

8. Doss was released to work with restrictions by his treating doctor, Dr. Arthur Wardell, on February 25, 1999. As of that date, the parties agree that Doss could earn $7.00 per hour and could work 40 hours per week, within his medical restrictions. The parties agree that Doss has a weekly wage loss of $667.97, and that his permanent partial disability compensation rate is $445.31 per week.

9. As a result of the combined 1995 and 1997 injuries, Doss is physically unable to perform his work for N&W; N&W has no alternate work available within Doss's medical restrictions.

10. Doss had filed an appeal from a grievance under the Railway Labor Act, relating to his termination by N&W. That appeal was decided in his favor, with an order of reinstatement.

11. Since N&W accepts Doss's 1997 injury as compensable, N&W will reinstate Doss on the seniority roster so he will be entitled to disability benefits for a job-related injury from the Railroad Retirement Board.

Doss hereby agrees that:

12. Dr. Morales was not authorized to act as his treating doctor for the 1995 injury and that the pending claim, No. 5-097181, should be dismissed with prejudice and that file should be closed.

13. He is physically unable to resume his job at N&W, and therefore declines to enforce the remedy offered under the Railway Labor Act grievance procedure.

14. Because his 1997 injury has been accepted by N&W and N&W agrees to provide full compensation for this injury, Doss has no claim under Section 48(a) for discriminatory discharge, or for any other act by N&W up to the date of his signing of this stipulation. [EX 1].

15. The parties are subject to the provisions of the Act;

16. That an employer/employee relationship existed between the parties at all relevant times. [TR. 4].

Issue

The Employer's entitlement to relief under Section 8(f) of the Act.

Pertinent Law

Section 8(f) of the Act may be invoked by the Employer to limit its liability for compensation payments for permanent disability and death benefits if the following elements are present: (1) Claimant had pre-existing permanent partial disability; (2) the pre-existing disability was manifest to Employer; and (3) the disability or death which exists after the work-related injury is not due solely to that injury, but is a combination of both that injury and the existing permanent partial disability.

Response from the Director

In November 1999, Counsel for the Director stated that

> After reviewing the Employer's Supplemental Application for Section 8(f) Relief filed on September 21, 1999, the Director has decided not to oppose the Employer's request for 8(f) relief. In the event that a compensation order awarding benefits for permanent disability (excluding a nominal award) is appropriate in this case, the Director agrees to the application of § 8(f) and payment by the Special Fund. See Todd Shipyards Corp. v. Director, OWCP (Porras), 792 F.2d 1489 (9th Cir. 1986) (an employer is not entitled to § 8(f) relief from a nominal award because, as a matter of law, any pre-existing permanent partial disability can not materially contribute to the current disability.) In such event, payment by the Special Fund should commence 104 weeks after the date the evidence establishes that the claimant reached maximum medical improvement, less any periods of temporary disability. In no event does the Director agree to the application of § 8(f) or payment by the Special Fund, in any settlement of the claim. 33 U.S.C. 908(i)(4).

The Employer’s brief, dated September 21, 1999 does provide pertinent information that was not contained in the stipulations or the Employer’s Exhibits.

In the brief, the Employer reports the date of maximum medical improvement (MMI) as being in April 1999. [See 11 and 12 on page 2].

Dr. Wardell states that the Claimant reached MMI on April 8, 1999 [EX 2; EX Q in the brief].

The undersigned concludes that all requirements for a grant of Section 8(f) relief have now been met. There is more than a nominal award in this case.

Order

1. The Employer is to pay compensation to the Claimant as provided in the stipulations.

2. Beginning February 25, 1999 and thereafter the Claimant has a wage loss of $667.97 per week, resulting in a compensation rate of $445.31 per week.

3. The Claimant reached MMI on April 8, 1999.

4. All computations are subject to verification by the District Director.

5. Upon the expiration of 104 weeks after April 8, 1999 such compensation and adjustments shall be paid by the Special Fund established pursuant to the provisions of 33 U.S.C. §944.

6. Employer shall receive credit for all compensation that has been paid.

7. Claimant's attorney within 20 days of receipt of the order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

8. Employer is to pay to the Claimant interest at the rate specified in 28 U.S.C. Section 1961 in effect when this Decision and Order is filed with the office of the District Director. Interest shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia